United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

74-1162

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ARCHIE PELTZMAN,

Plaintiff-Appellant,

v.

CENTRAL GULF LINES, INC.,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE CENTRAL GULF LINES, INC.

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Counterstatement of the Issues

I. Whether the District Court correctly granted defendant-appellee's motion for summary judgment on the grounds that:

1. The claim was a matter over which the National Labor Relations Board has exclusive jurisdiction;
2. Plaintiff-appellant was collaterally estopped from pursuing the instant action;
3. Plaintiff-appellant failed to state a claim upon which relief can be granted;

and

4. The National Labor Relations Board had already denied the claim made in the instant action—

any one of the grounds being sufficient to affirm the summary judgment granted?

II. Did the District Court err in holding that material questions of fact existed as to whether plaintiff-appellant failed to exhaust his contractual grievance remedies?

Counterstatement of the Case

The defendant-appellee ("appellee"), Central Gulf Lines, Inc. ("Lines"), a steamship company, is party to a collective bargaining agreement with the American Radio Association, AFL-CIO ("ARA"). The ARA is a labor organization and duly authorized collective bargaining agent for radio operators employed by defendant. Plaintiff-appellant ("appellant") Archie Peltzman, is a radio operator and former employee of appellee.

Appellant was first employed by appellee on the SS Green Ridge in May, 1970 and completed three voyages on that vessel.

In May 1971, appellee was advised by the ARA that appellant had not made payment of his union initiation fees. The contract between Lines and the ARA contains a union shop provision which provides that:

> "The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring." (A. 87)*

On May 28, 1971 appellant was advised, in conformity with the ARA/Lines contract, that he would:

> ". . . not be able to rejoin the vessel, without prior clearance from the Union." (A. 105)

Appellant chose not to pay his initiation fee and thereafter could not be further employed by Lines.

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* A. refers to the Joint Appendix followed by the page numbers.

The Lines-ARA contract contains a grievance provision stating in part that:

> "Any radio officer . . . who feels that he has been unjustly . . . discharged . . . shall endeavor to have such grievance adjusted according to the . . . [contractual grievance machinery]." (A. 90)

To date, appellant, by his own admission (A. 115, ¶ 14) has failed to file a grievance concerning this claim.

Instead, during the fall of 1971 appellant filed an unfair labor practice chage against Lines alleging that he had been improperly terminated by Lines.

On October 21, 1971 the National Labor Relations Board, Region 2, refused to issue a complaint against Lines on the ground that the evidence failed to establish a violation of the National Labor Relations Act in that Lines' refusal to hire appellant was pursuant to a valid union security clause under Section 158 (a) (3) of that Act (Addendum 12-13) (A. 62-63). Subsequent appeals to the NLRB General Counsel were denied.

Appellant's appeal of the Board decision was then dismissed by the United States Court of Appeals for the Second Circuit (Docket No. 72-1091) (not officially reported). Subsequently, the United States Supreme Court denied certiorari (409 U.S. 887 (1972)) and petition for rehearing (409 U.S. 1050 (1972)).

On December 29, 1971, in an action brought by appellant against the ARA in New York Supreme Court, the same claim as set forth in the instant matter, was adjudicated and determined in favor of that defendant. The court held that:

> ". . . it is clear . . . that exclusive primary jurisdiction rests with the NLRB and that this court does not have jurisdiction of the subject matter of the action." (*Peltzman* v. *American Radio Association*,

327 N.Y.S.2d 505, 510 (1971), *aff'd*, 335 N.Y.S.2d 998 (1971).)

Appellant's motion for leave to appeal to the New York State Court of Appeals was denied. Additionally, his petitions for certiorari and for rehearing were also denied (411 U.S. 910 (1973) and 411 U.S. 977 (1973) respectively).

On January 7, 1974, appellant brought the instant action for damages and injunctive relief in the United States District Court for the Southern District. That Court granted Lines' motion for summary judgment on four separate and distinct grounds (A. 2-5). Appellant now appeals from that order (A. 7).

Argument

Introduction

The District Court granted Lines' motion for summary judgment on four separate and distinct grounds. In so doing, it found that as to each ground no material issue of fact was in dispute and that appellee was therefore entitled to summary judgment as a matter of law.

Clearly, any one of the four grounds was, in and of itself, sufficient to independently sustain the summary judgment granted. Thus, that a material issue of fact may be in dispute as to a fifth nonrelated ground raised by appellee, i.e., failure to exhaust the contract's grievance procedure, is not relevant herein and in fact is moot.

Appellant in support of his appeal from the District Court's Order Dismissing the Complaint (A. 6), relies on two sections of the Merchant Seamen Act—46 U.S.C. § 594 and § 599 (a) (Addendum 13-14). Such reliance is obviously misplaced as neither section is remotely applicable to the instant matter.

46 U.S.C. § 594 (Addendum 13) mandates the payment of a sum equal to a month's wages (in addition to that ac-

tually earned) to a seaman on articles who is discharged without just cause either before the commencement of or during a voyage. Appellant was not on articles at the time appellee refused to reemploy him. Clearly as the District Court correctly held, the section:

> ". . . has no application to the situation." (A. 5)

Nor is that portion of 46 U.S.C. 599 (a) (Addendum 13-14) raised at page 19 of appellant's brief applicable. The language quoted is an anti-kickback provision which is completely inapplicable to this matter. Additionally, such question was not raised in the pleadings and accordingly, is not properly before this Court.

Similarly, the anti-trust contention found at pages 30-31 of appellant's brief is inapplicable here and was not raised below and thus is not properly before this Court.

I

The National Labor Relations Board has exclusive jurisdiction of the subject matter of the complaint. In exercising that jurisdiction it has determined that appellant's claim is without merit.

A. Exclusive Jurisdiction of the National Labor Relations Board

Appellant, claims that appellee's refusal to reemploy him was based on his union status—his failure to pay his union initiation fees. He correctly asserts "That the controversy as to [his] membership or non-membership in the union [is] a labor dispute. . . ." (A.10, ¶ 10). He alleges that:

> ". . . he has a right to work and pursue a lawful occupation without being discharged because of a labor controversy, or a contract which provides for membership or non-membership in a labor union as a condition of employment." (A.10, ¶ 12).

Appellant's allegations place his charge of wrongful discharge squarely under the Labor Management Relations Act, as amended, 29 USC § 158 (a) (3) Addendum 12-13). That provision permits employers and unions to enter into union security agreements under conditions and limitations specified therein. The Lines/ARA union security agreement was found by the NLRB to be a "valid" agreement within the terms of 29 USC § 158 (a) (3). (A.62)

The conduct of which appellant complains—failure to reemploy appellant based on his union status—is clearly conduct prohibited or protected by that Act.

The general rule regarding the exclusive jurisdiction of the NLRB was recently restated by the United States Supreme Court in *Motor Coach Employees* v. *Lockridge* (403 U.S. 274 (1971)) when the Court stated that:

> "*San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 . . . established the general principle that the National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." (403 U.S. at 275).

The Court also pointed out that the Labor Management Relations Act provides:

> ". . . a general federal law of labor relations combined with a centralized administrative agency [the National Labor Relations Board] to implement its provisions necessarily supplant[ing] the operation of the more traditional legal processes in this field." (Id. at 276)

The lower court correctly held that the NLRB has exclusive jurisdiction of appellant's dispute thereby pre-empting it from further action.[1]

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[1] The decisions cited by appellant are distinguishable on the facts and/or inapplicable on the law and generally predate the United States Supreme Court decision in *Motor Coach Employees* v. *Lockridge* (403 U.S. 274 (1971)) discussed *supra.*

Appellant had also recognized the exclusive jurisdiction of the NLRB when he initially filed unfair labor practice charges on September 14, 1971, with the NLRB against both Lines and the ARA over the identical subject matter as the instant complaint.

B. The NLRB Has Previously Determined That Appellant's Claim Is Without Merit

After a full investigation of appellant's charges, the Regional Director of the National Labor Relations Board, Region 2, refused to issue complaints on October 26, 1971, stating that:

> "The evidence established that the company refused to rehire you as a crew member aboard the SS Green Ridge pursuant to a valid union security clause between it and the American Radio Association, AFL-CIO because of your failure to remit initiation fees after notification by the latter that such fees were due and not for any reason prohibited by the aforesaid Act. I, therefore, am refusing to issue a complaint in this matter." (A. 62)

Subsequent appeals to the General Counsel of the National Labor Relations Board were denied. His appeal to the United States Court of Appeals for the Second Circuit was denied (Docket No. 72-1091) (not officially reported). Additionally, the United States Supreme Court denied certiorari (409 U.S. 887 (1972)) and rehearing (409 U.S. 1050 (1972)).

Appellant had his day in court with Lines on the issues involved herein. The NLRB determined that the claim was without merit. That determination was affirmed by the Courts.

No material issue of fact is in dispute as to the exclusive jurisdiction of the NLRB and/or its determination.

II

Appellant's claim has been previously adjudicated and determined. Accordingly, he is collaterally estopped from pursuing the instant claim.

The doctrine of collateral estoppel applies where, as in the instant matter, there exists a similarity of issues between a preceding action and a pending action and the party-plaintiff is the same. The party-defendants need not be the same. *Alessandrini* v. *Musicians, Local 802*, —— F.Supp. —— 75 LRRM 2338 (S.D.N.Y. 1970) (not officially reported).

On December 29, 1971, appellant brought suit against the ARA in New York Supreme Court, Special Term, Part I, New York County. The suit was for the same claim set forth in the complaint in the instant matter. Judgment was rendered in favor of the ARA dimissing appellant's action (327 NYS 2d 505 (1971)). The dismissal was unanimously affirmed, without opinion of the State of New York, Supreme Court, Appellate Division, First Department (335 N.Y.S. 2d 998 (1972)). Leave to appeal to the New York State Court of Appeals was denied. Certiorari and rehearing were also denied by the United States Supreme Court (411 U.S. 916 (1973) and 411 U.S. 977 (1973) respectively).

In view of the foregoing, the District Court correctly held that appellant was collaterally estopped from pursuing the instant action.

III

Appellant has failed to state a cause of action in that, on the merits, appellee's refusal to hire him was lawful under the circumstances.

The sole reason appellant was not re-employed was his failure to pay the union initiation fees as required by the

union security provision of the Central Gulf-ARA contract which provides:

> "Section 4. (b) The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring." (A. 87).

Appellant freely admits he so refused (A. 115, ¶ 14; Appellant's Brief p. 11). By so doing he also admits that, as to this ground upon which summary judgment was granted, no material issue of fact exists.

Appellant further claims that the Lines/ARA union security provision constitutes an illegal closed shop and is unconstitutional.

The provision is in fact a paraphrase of language contained in, and thus specifically sanctioned by, the Labor Management Relations Act, as amended (29 U.S.C. § 158 (a) (3)) and was also found to be valid by the NLRB, the agency enforced with the administration of the statute. The constitutionality of union security clauses, similar to the one contained in the Lines/ARA contract, has been confirmed by the United States Supreme Court in *NLRB* v. *General Motors Corp.* (373 U.S. 734 (1963)).

Defendant-appellee is guilty of no impropriety or breach of contract. Its action was entirely lawful and consistent with the union security provision of the contract.

Accordingly, the lower court correctly held that:

> "On the merits, defendant's refusal to hire plaintiff was lawful under the circumstanes." (A. 4)

IV

Appellant failed to exhaust his administrative remedies.

The lower court erred when it determined that a material issue of fact existed concerning whether or not appellant exhausted his contractual grievance remedies.

That the appellant is bound by the contractual grievance procedures (A. 90-92) is beyond dispute. That he has failed to utilize these procedures is also beyond dispute. In fact appellant admits he did not utilize the grievance procedures (A. 115, ¶ 14).

The United States Supreme Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), has held that in the absence of a satisfactory explanation:

> "[I]f the . . . employee . . . resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon a breach of the collective bargaining agreement, he is bound by the terms of that agreement, which govern the manner in which contractual rights may be enforced. For this reason it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650." (Id. at 184-85).

Appellant's contention that an attempt to utilize the grievance procedure would have been futile should be rejected. Appellant admits he never sought to exercise his rights to file a grievance. Any claim of futility is sheer conjecture. It does not amount to the "satisfactory ex-

planation" envisioned by the Supreme Court in *Vaca* v. *Sipes, supra.*[2]

In view of the foregoing, it is respectfully submitted that the District Court erred when it held that a material issue of fact was in dispute as to appellee's fifth ground in support of its motion for summary judgment. Such ground should have been sustained as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the District Court's Order Dismissing the Complaint be affirmed.

Dated: New York, New York, April 11, 1974.

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[2] *See, also Desrosiers* v. *American Cyanamid Co.*, 377 F2d 864 (2d Cir. 1967).

ADDENDUM

A. Section 8 (a) (3), Labor Management Relations Act, as Amended (29 U.S.C. § 158 (a) (3))

"§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons

$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment, whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500."

other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

B. Section 21, Merchant Seamen Act, 1972

(46 U.S.C. § 594)

"§ 594. Right to wages in case of improper discharge

Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, or having been improperly discharged, recover such compensation as if it were wages duly earned."

C. Section , Merchant Seamen Act, 1872

(46 U.S.C. § 599 (a))

"§ 599. Advances and allotments

(a) It shall be unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25 nor more than

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Defendant-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York **ss.:**

Rose Rinella, **being duly sworn deposes and says that she is** the agent for the attorneys for the above named Defendant-Appellee, Central Gulf Lines, Inc. herein. That she is over 21 years **of age, is not a party to the action and resides at** 951 E. 17th Street
Brooklyn, New York.

That on the 12th **day of** April, 1974, **she served the within** Brief of Defendant-Appellee Central Gulf Lines, Inc.
upon Archie Peltzman, Esq.,
~~attorney for the above named~~ plaintiff-appellant

by depositing 2 **of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at** 350 Canal Street ~~99 Church Street~~, **New York, New York**

directed to the said ~~attorney for the~~ plaintiff-Appellant **at No.** 8725 16th Avenue,
Brooklyn, New York 11214

N. Y., that being the address within the state designated by him **for that purpose, or the place where** he **then kept an office, between which places there then was and now is a regular communication by mail.**

Sworn to before me, this 12th
day of April **19** 74

Rose Rinella

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30 0932350
Qualified in Nassau County
Commission Expires March 30, 1975